UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 02-11317-RWZ

JEFFREY NADHERNY

v.

ROSELAND PROPERTY CO., INC*., et al.*

MEMORANDUM OF DECISION AND ORDER

March 18, 2004

ZOBEL, D.J.

Plaintiff Jeffrey Nadherny worked for defendant Roseland Property Co., Inc. ("Roseland"), a New Jersey-based commercial real estate developer, from May 1, 1999, until his employment was terminated on February 8, 2002. According to their employment contract ("Contract"), which was drafted by Roseland, plaintiff's responsibilities included "establishing, opening and operating a Roseland Property Company office in Boston, identifying new business opportunities for Roseland in Boston, interviewing, recommending and retaining consultants for specific projects, and supervision of project planning, permitting, construction and development." (Contract, ¶ 2.) Prior to joining Roseland, plaintiff had worked some 25 years in the real estate business, mainly as a commercial real estate broker, and he was the sole equity holder of a real estate consulting company called Belmont Advisors. Upon becoming a "partner" with Roseland, he agreed that "[a]ll Belmont agreements will become Roseland agreements for marketing purposes" and assigned Roseland percentages of fees that Belmont Advisors might become entitled to in the future "for the performance

of real estate brokerage and related services." (Contract, ¶ 12.) Roseland agreed to pay plaintiff an annual salary of $170,000, with fringe benefits such as a $500 monthly car allowance. (Contract, ¶¶ 5-6.) In addition, the employment contract included the following paragraph:

> You will be entitled to a participation interest in all new projects which originate out of Roseland's Boston office during the period of your employment. Roseland usually participates in projects through an affiliated entity (the "Roseland Entity") established for each project. Your participation interest in each applicable project will be equal to 15% of the cash distributed to the Roseland Entity after the Roseland Entity has received cash distributions equal to the Roseland Entity's capital contributions plus an eight percent (8%) return on such contributions for such project. Your interest in such new projects will vest at the same time that the Roseland Entity's interests vest. Your participation percentage is subject to review each year.

(Contract ¶ 8.) During plaintiff's period of employment, a number of new projects originated out of the Boston office.

On June 28, 2002, plaintiff filed this diversity action against Roseland and five project-specific affiliated entities. His Second Amended Complaint, filed on July 13, 2003, includes five counts seeking declaratory relief as to the revenues to which he is entitled in four projects that originated while he worked for Roseland[1]; a sixth count for breach of the covenant of good faith and fair dealing; and a seventh count for breach of written contract. The parties have filed cross-motions for summary judgment on all counts.

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[1] The projects are the Portside at Pier One Boston Harbor Shipyard & Marine in East Boston (Count I), Overlook Ridge (Count II), the Cochis property in Canton and Randolph (Counts III and IV, reflecting the two affiliated entities formed in connection with this project), and the Hingham Shipyard development (Count V).

Under Massachusetts law, contract interpretation is a question of law for the judge. If a contract is unambiguous, the plain and ordinary meaning controls, there is no need to consult extrinsic evidence. Lohnes v. Level 3 Communications, Inc., 272 F.3d 49, 53 (1st Cir. 2001). Although a contract ambiguity often presents a fact issue for the jury, "'the question of whether a contract term is ambiguous is one of law for the judge.'" NASCO Inc. v. Public Storage, Inc., 29 F.3d 28, 32 (1st Cir. 1994) (quoting FDIC v. Singh, 977 F.2d 18, 22 (1st Cir. 1992)). "When the judge finds that a contract term is, in some material respect, uncertain or equivocal in meaning, then all the circumstances of the parties leading to its execution may be shown for the purpose of elucidating, but not contradicting or changing its terms." NASCO, 29 F.3d at 32 (citations and internal quotation marks omitted). Additionally, "[a]mbiguous language in an agreement is to be construed against the drafter of the agreement." Demoulas v. Demoulas Super Markets, Inc., 677 N.E.2d 159, 203 n.72 (Mass. 1997). A judge may properly construe even an ambiguous contract where "the evidence presented about the parties' intended meaning [is] so one-sided that no reasonable person could decide the contrary." Boston Five Cents Sav. Bank v. Secretary of Dept. of Housing & Urban Dev., 768 F.2d 5, 8 (1st Cir. 1985).

The declaratory judgment counts hinge on whether plaintiff's interests in the development projects were required to "vest" during his employment with Roseland in order for him to be entitled to a percentage of the revenues.[2] Defendants contend that

[2] A holding that vesting during employment is required would resolve Count 7 (breach of written contract) in defendants' favor, although a holding the other way on the question of vesting would raise the additional issue of when vesting would actually occur. If the interests have not vested, defendants would not be obligated at moment to pay anything to plaintiff, and therefore the breach of contract claim would be unripe.

(1) plaintiff admitted in deposition testimony that "vesting" occurs at the moment of "project closing/start": when the financing is secure and construction is about to begin; (2) none of the four projects for which plaintiff seeks declaratory relief was even close to "project closing/start" when he was fired[3]; and (3) the Contract expressly requires that vesting occur during the period of employment because, in addition to plaintiff's employment, it allows the parties to terminate at will "this relationship." Plaintiff, for his part, argues that the Contract entitles him to a participation interest in all projects that originated under his watch and that the vesting language refers only to the timing of payments.

The first two prongs of defendants' argument are, in essence, conceded. The parties agree that "vesting" occurs at "project closing/start,"[4] and plaintiff freely testified that none of the four projects at issue had reached the "project closing/start" stage at the time of his termination. The one exception to this vesting regime is the Overlook Ridge project. Plaintiff contends that he has a presently vested 20% stake in the project, and deposition testimony and an email by Roseland's president Marshall B. Tycher confirm that circumstances unique to the project caused the parties to reach an alternative arrangement.[5]

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[3] The parties agree that a fifth project, Faxon Woods, has vested.

[4] Plaintiff responded in the affirmative when asked whether, under the final agreement, "[t]he vesting occurs when the financing is taken and the construction has or is about to begin." (Nadherny Deposition at 88-89.)

[5] According to Tycher's email dated October 11, 2000, plaintiff's interest was increased to 20% in exchange for giving up certain fees that Belmont Advisors would have been entitled to up front. Tycher's deposition testimony confirms that "Jeff was already a partner in the land at Overlook." (Tycher Deposition at 104.) Tycher explained that Overlook was different from the typical Roseland development project

Ultimately, defendants' argument for summary judgment on the declaratory judgment counts hinges on the notion that the contract expressly mandates that all unvested property interests revert to Roseland upon termination of employment. This reading of the contract is based on a boldface paragraph near the end that provides that "either you or Roseland may terminate your employment and this relationship at any time with or without cause, for any reason or no reason, and with or without notice." (Contract at page 3, emphasis added). Embracing the principle that "[c]ontracts . . . require that every word should be given effect if possible," Merchants Nat. Bank v. Stone, 5 N.E.2d 430, 433 (Mass. 1936), defendants argue that "[b]y drawing a distinction between 'employment' and 'this relationship,' the parties expressed their intention that both Mr. Nadherny's employment and the contractual relationship between them could be terminated by either one." (Def. Mem. in Support of Summary Judgment, at 16; see also Def. Opp. to Pl. Mot. for Summary Judgment, at 8.) Defendants are hoist on their own petard. In addition to the language cited by defendants, the contract states that "your relationship to Roseland, and your interests in projects, will be established and governed by the provisions of this agreement." (Contract, ¶ 4, emphasis added.) By defendants' own logic, then, "relationship" means something different from plaintiff's "interests in projects." If "relationship" is to have some meaning apart from "employment," it undoubtedly refers to Roseland's purposeful entanglement

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because the company had to assume control over the property much earlier than usual:

> Most land ventures we've had, for example, like Hingham, there's no entity formed that's operating that has land vested in it until such time as we actually have permits and a closing and a start on the project. So Overlook was a little bit different, because we had all that money advanced. So we transferred, we negotiated a transfer of the ownership into the land entity. (Id. at 106.)

with plaintiff's consulting firm, Belmont Advisors. (See, e.g., Contract, ¶ 14 ("[F]ollowing termination of our relationship, Roseland will return to you all Belmont contracts for real estate brokerage and related services . . . .").)

A number of other factors strongly support plaintiff's interpretation of the Contract. First, the cases show that similar contracts in dispute consistently include clauses that provide for the disposition of unvested stock and other property options upon the termination of employment. Defendants fail to cite a single case suggesting otherwise. One relevant case defendants do cite, Harrison v. NetCentric Corp., 744 N.E.2d 622 (Mass. 2001), involved a contract that included a vesting schedule for stock options. Not only did that contract expressly condition vesting on continued employment, but it also gave the employer the right to buy back unvested shares at the original purchase price. Id. at 626. See also Cataldo v. Zuckerman, 482 N.E.2d 849, 852 (Mass. App. Ct. 1985) (describing a buy-back provision); Sargent v. Tenaska, 108 F.3d 5, 7 (1st Cir. 1997) (vesting schedule linked to continued employment, buy-back provision). In the present case, the Contract neither conditions plaintiff's participation interest on continued employment nor provides that plaintiff loses his interest if his employment ends before "project closing/start." The absence of any such language – especially where the Contract does include a termination clause – suggests that the vesting of plaintiff's interests is not contingent upon continued employment.

Second, the circumstances leading up to the Contract strengthen plaintiff's position further. Plaintiff had made his reputation as a commercial real estate broker at the time he entered the Contract. Upon signing with Roseland, he ceded certain

brokerage-type fees to which he would have been entitled.[6] Roseland wanted to bring plaintiff on board because of his prowess as a broker, and the Contract's incentive structure – rewarding plaintiff for originating as many deals as possible – amply reflects the company's interest in getting a Boston operation up and running. Conversely, it makes perfect sense that plaintiff would forgo his up-front money in exchange for a larger amount down the line.

The fact that the position with Roseland did not simply involve originating deals, but also included a whole range of development duties, does not mean that the participation interest was contingent on continued employment. Rather, the range of duties – and plaintiff's lack of experience in many areas of real estate development – was used by Roseland to bargain for a lower participation percentage for plaintiff. In a January 21, 1999, letter, Tycher wrote plaintiff in the context of negotiating this percentage (Roseland was proposing a 12.5% allocation, while plaintiff sought a 17.5% interest): "Our business only begins with identifying projects; it is ultimately accomplished with plans, approvals, financing, equity, construction and management. I hope, in time, that we come to learn that your skill sets are all encompassing, but, only time will tell." The possibility that plaintiff would be a better broker than developer was reflected in the 15% interest that was ultimately reached. As Tycher emailed plaintiff on October 11, 2000, "[w]e wont [sic] know until time has passed if you are worth the 15% in the other deals that we are working on, but that is our risk." If plaintiff's interest had been contingent upon continued employment, Roseland was bearing very little risk at all.

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[6] It is unnecessary for the Court to determine the exact amount of these fees.

Taken as a whole, the language of the Contract and absence of a termination provision as to plaintiff's unvested real estate interests (construed against Roseland, which drafted the agreement), the circumstances leading up to the Contract, and the case law concerning analogous contracts all demonstrate that there is no genuine issue of material fact as to the interpretation of the Contract. Plaintiff's unvested interests in defendants' projects did not revert to defendants upon the termination of employment. Plaintiff is therefore entitled to summary judgment on Counts I through V of his Second Amended Complaint.

The parties also seek summary judgment on Counts VI and VII, which, respectively, allege breach of the implied covenant of good faith and fair dealing and breach of contract. Under the implied covenant of good faith and fair dealing, employees may recover certain future interests if "the discharge ha[d] been done in bad faith" and if "the interest or claim pertains to 'past' services, *i.e.*, to services already performed at the time of the discharge." Sargent, 108 F.3d at 7 (citing Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1257-58 (Mass. 1977)). There is no genuine issue of material fact as to the bad faith element. Defendants provide much evidence of concern over plaintiff's performance and that the risk they had taken in hiring someone with limited development experience was not working in their favor. Although plaintiff notes that defendants did not tell him that they were firing him for performance-based reasons, that alone raise no inference that the firing was motivated by a desire to deprive plaintiff of his interests in defendants' projects, especially where

those interests were and remain temporally remote.[7] Defendants, therefore, are entitled to summary judgment on Count VI.

The breach of contract claim is unripe for decision because by all accounts none of the events that would trigger payments to plaintiff has occurred – namely, the receipt by a Roseland Entity of "cash distributions equal to the Roseland Entity's capital contributions plus an eight percent (8%) return on such contributions for such project" (Contract, ¶ 8). Given the contingent nature of plaintiff's future interests in defendants' projects, attempts to quantify those interests in present value are speculative at best, and plaintiff's estimate of $15 million is wholly unconvincing. Until defendants are obligated to perform under the Contract, they will not be held liable for the breach. Count VII is therefore dismissed without prejudice.

Accordingly, plaintiff's motion is allowed as to Counts I to V. Defendants' motion is allowed as to Count VI. Count VII may be dismissed. Judgment may be entered for plaintiff on Counts I, II, III, IV, and V; for defendants on Count VI; and dismissing Count VII without prejudice.

_____ /s/ Rya W. Zobel

DATE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

[7] Plaintiff includes in his papers certain representations made by defendants in settlement discussions that he argues show that defendants had bad faith motivations, and he notes that the timing of his departure was affected by the fact that he retained an attorney for those discussions. Defendants' bargaining position in settlement talks is not probative of any bad faith in the decision to terminate, nor is the fact that the timing of the termination was accelerated due to plaintiff's posture in those discussions. The decision to terminate had already been made.